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Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Ex Parte Presentation - In the Matter of Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended (CC Docket No. 96-149)

Dear Mr. Caton:

In their reply comments in the above-captioned proceeding, certain of the Regional Bell Operating Companies and their affiliate, Bell Communications Research, Inc. ("Bellcore") took exception to certain aspects of the comments submitted by the Telecommunications Industry Association ("TIA"), outlining TIA's views concerning the construction and implementation of the "generic" safeguards established in Section 272 of the Communications Act, as amended, and their relationship to the manufacturing-specific provisions contained in Section 273 of the Act. By its attorneys, TIA hereby responds to the arguments advanced by the RBOCs and Bellcore on reply, which TIA has not previously had the opportunity to address.

As the discussion below indicates, in each instance, the arguments offered in opposition to TIA's position misconstrue the relevant statutory provisions and, if adopted, would serve to diminish the effectiveness of the safeguards adopted in Section 272 and 273 in constraining unlawful discrimination and other anticompetitive conduct. TIA's responses to the specific manufacturing-related issues addressed by the RBOCs and Bellcore in their reply comments are as follows:

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BOC Standard-Setting Activities:

In its reply comments, Bellcore takes issue with comments submitted by TIA and MCI, asserting that they "mischaracterize Bellcore's generic requirements process and its place in the statutory scheme of the Telecommunications Act of 1996." Bellcore Reply at 1. Bellcore asserts that TIA's discussion of the non-discrimination provisions of Section 272(c)(1) ignores the specific statutory procedures of Section 273(d), in suggesting that standards and generic requirements should only constitute a valid basis for use by BOCs if the BOCs follow 'ANSI-style procedures' in their development." Bellcore Reply at 2. In opposing TIA's suggestion, Bellcore argues that "[t]he statutory plan is that the procedures of Section 273(d), and consistent procedures of the non-accredited standards development organization and those who ultimately fund and participate in its development of generic requirements, are to apply to the development of such requirements." Id.

TIA Response: In its reply, Bellcore correctly observes that it is required to establish and follow procedures that conform with the requirements of Section 273(d) when it is engaged in the development of "industry-wide" standards and generic requirements for telecommunications equipment and CPE. However, Section 272(c)(1) and Section 273(e) impose independent non-discrimination obligations on the BOCs in the areas of procurement and standard-setting. These obligations, apply to all BOC procurement and standard-setting activities, in contrast to the requirements of Section 273(d), which apply only to the development of "industry-wide" standards and generic requirements by non-accredited entities such as Bellcore. In establishing generic requirements for telecommunications equipment and/or CPE which it seeks to procure, a BOC must ensure that the requirements it adopts are non-discriminatory in nature, irrespective of whether they were developed by the BOC itself or by another entity, e.g. Bellcore. In the latter case, the fact that the relevant generic requirements may have been developed by Bellcore -- using procedures designed to satisfy the minimum requirements for such activities established in Section 273(d), which incorporates some but by no means all elements of the procedures used by ANSI-accredited SDOs -- does not in itself ensure that the requirements themselves are non-

discriminatory in nature. Moreover, Bellcore's use of such procedures does not serve to foreclose the possibility that the BOC has acted in a discriminatory manner, in adopting and implementing some or all of Bellcore's recommendations or in other aspects of its own procurement and standard-setting activities, a result which clearly would be inconsistent with the requirements of Section 272(c)(1) and Section 273(e) of the Act.

Procurement Regulations

The reply comments filed by Pacific Telesis Group assert that "TIA is wrong when it argues that additional requirements are needed to implement the Section 272 provision concerning procurement." PacTel Reply at 17. PacTel contends that because "Congress established criteria in Section 273(e)(2)" addressing BOC procurement, "[n]o additional requirements under Section 272 are needed." Id. PacTel goes on to assert that "TIA also is wrong to include unregulated products, including CPE, in its proposed definition of goods and services subject to Section 272(c)(1) requirements," arguing that because this section falls within Title II of the Communications Act, it is therefore "limited to regulating the BOC's and its affiliates' goods and services that are part of common carrier service." Id.

TIA Response: While there clearly is some degree of overlap in the activities covered by the non-discrimination provisions of Section 272(c)(1) and the procurement provisions contained in Section 273(e), the mere existence of the latter provision does not obviate the need to adopt regulations implementing the procurement-related provisions of Section 272. Section 272(c)(1) establishes a broad prohibition on discrimination by a BOC "in the provision or procurement of goods, services, facilities and information, or in the establishment of standards." In contrast, Section 273(e) imposes additional non-discrimination requirements on BOC procurement activities which complement, but do not negate, the more general non-discrimination obligations imposed in Section 272(c)(1). The more expansive language used in Section 272(c)(1), barring BOC discrimination in the procurement of any "goods, services, facilities and information," is designed to address potential risks of discrimination (and related cross-subsidy concerns) arising from the full range of

activities which the BOCs are required to conduct through a separate affiliate. In contrast, the language used in Section 273(e) focuses on procurement activities which are of particular concern to equipment manufacturers attempting to market their products to the BOCs, in competition with BOC affiliates and other vendors. It is entirely appropriate, and indeed essential, that the FCC establish rules implementing the related yet distinct statutory obligations imposed on the BOCs under sections 272 and 273. In its comments, TIA has urged that each BOC should be required to establish specific procedures for ensuring compliance with the non-discrimination requirements of Section 272(c)(1), which should be submitted for public comment and review by the Commission. Compliance plans developed by the BOCs for this purpose can and should be designed to reflect the additional statutory requirements and implementing rules adopted by the Commission pursuant to Section 273(e) as well.

PacTel also is mistaken in asserting that it is inappropriate to include "unregulated products, including CPE," in the definition of "goods and services" subject to the non-discrimination requirements of Section 272(c)(1). The literal terms of the statute clearly do not limit the scope of the BOCs' obligations in this manner. Indeed, the most natural reading of the statutory language is to include <u>all</u> "goods and services" purchased by a BOC, not merely those that are "regulated" or that are "part of common carrier service." The accepted meaning of these terms plainly is broad enough to encompass BOC procurement of all types of telecommunications equipment, CPE, and related equipment, software, and services. Moreover, the risk of self-dealing and attendant cross-subsidy which Section 272(c)(1) is designed to address exists whenever a BOC makes a purchase from its affiliate of goods or services <u>of any type</u>, to the extent that the costs of such goods or services are or may be imposed, directly or indirectly, on the BOC's regulated activities.

<u>BOC Involvement in Equipment Design</u>

In its reply comments, U S West asserts that "both IDCMA and TIA claim that Section 273(b)(1) does not authorize a BOC to participate in the design of equipment prior to its receipt of in-region, interLATA authorization, and that once the BOC has that authorization, it may engage

in that activity only through a separate affiliate." U S West Reply at 21. In U S West's view, "Section 273(b)(1) allows a BOC to participate with a manufacturer in the design of equipment, and to do so immediately." Id. at 23 U S West also objects to IDCMA's contention that Section 273(b)(1) was intended merely to "codify" the BOCs' right under the MFJ to engage in certain types of collaborative activities (e.g. the development and provision of "generic" or "functional" requirements or "performance specifications" for equipment which the BOCs seek to procure). In this regard, U S West argues that "[b]ecause 'manufacturing' does not include the provision of generic specifications, the Act did not need to grant the BOCs explicit permission to engage in that activity" and that therefore in enacting Section 273(b)(1) "Congress must have intended to expand the activities permitted to the BOCs." Id. at 22. U S West goes on to cite the provisions of the Senate and House bills as evidence that Congress "intended to allow the BOCs to engage directly in the design process, rather than through a separate affiliate." Id. at 24.

TIA Response: As an initial matter, it should be noted that TIA's comments did not address the nature or scope of activities permitted under Section 273(b)(1) of the Act. Indeed, U S West acknowledges that TIA did not discuss this section of the Act at all in its comments. See U S West Reply at 21. The Commission has indicated that it plans to initiate a separate rulemaking proceeding focusing on issues relating to the implementation of Section 273, and TIA expects to address the proper construction of Section 273(b)(1) in that context. In the cited portion of its comments in this proceeding, TIA merely noted that under Section 272(a), the BOCs must engage in activities which fall within the definition of "manufacturing" adopted by the courts in the MFJ proceedings only through a "separate affiliate" which satisfies the requirements established elsewhere in Section 272, as well as the additional, manufacturing-specific safeguards contained in Section 273. See TIA Comments at 10. TIA further noted that the MFJ definition of manufacturing included the design and development, as well as the fabrication, of telecommunications equipment and CPE. Id. at 10-12.

To the extent that the Commission determines to address U S West's arguments concerning the purported ability of the BOCs to "engage directly in the design

process" pursuant to Section 273(b)(1), TIA urges the Commission to make it clear that this provision should not be read as creating an expansive, ill-defined exemption which allows the BOCs to avoid the entry provisions, structural and accounting safeguards, and non-discrimination requirements established in Section 272 and 273 of the Act. U S West is correct in asserting that under the MFJ the BOCs were allowed to (and did) engage in the development of "generic" or "functional" specifications for equipment which they seek to purchase. However, the fact that such activities were not deemed to constitute impermissible "manufacturing" under the decree does not inevitably lead to the conclusion that Section 273(b)(1) granted the BOCs immediate, unrestricted authority to "engage directly in the design process" of any manufacturer (including the BOCs' manufacturing affiliates), as U S West suggests. Indeed, when the language, legislative history and underlying purpose of this and other related provisions are considered, it is clear that such an expansive reading of the statute cannot be sustained. See discussion below.

Nor would the rejection of U S West's overly broad construction render Section 273(b)(1) meaningless, as U S West contends. In judicial proceedings under the MFJ and throughout the legislative debate which ultimately led to enactment of the 1996 Telecom Act, the BOCs and their allies repeatedly argued that the BOC manufacturing restriction and the definition of "manufacturing" adopted by the courts was unduly vague and had an inhibiting effect on the BOCs' ability to communicate their needs and desires to suppliers and ensure that products developed for installation in or connection to the BOC network were suitable for such use. The language and legislative history of Section 273(b)(1) reflects an effort to address this concern, by allowing the BOCs to interact with manufacturers who are engaged in the "design and development of hardware, software, or combinations thereof," to ensure that such products interconnect and interoperate effectively with the BOCs' networks.

In response to U S West's assertions concerning the nature and scope of activities permitted under this provision, TIA notes that the language adopted in Section 273(b)(1) plainly does not state that a BOC may "engage directly in the design process" of any manufacturer, including the "separate affiliate" established by the BOC

pursuant to Section 272(a). Indeed, to construe the statute in this manner clearly would subvert the structural safeguards established in Section 272, in particular the requirement that an affiliate engaged in manufacturing "operate independently" from its affiliated BOC. Rather, as the Senate Report cited by U S West observes, the intended effect of the language incorporated in Section 273(b)(1) was to make it clear that "close collaboration [between BOCs and manufacturers] is necessary to permit the interconnection of networks and the interoperability of equipment," and would be permitted to the extent it is conducted in a manner consistent with the antitrust laws. Report of the Committee on Commerce, Science, and Transportation on S. 652, S.Rpt. No. 104-230, at 46.(emphasis added) Properly construed, then, this section permits a BOC to work closely with a manufacturer engaged in the design and development of hardware, software, or combinations thereof, to the extent necessary to ensure that the products designed by the manufacturer will properly interconnect and interoperate with the BOC's network.

TIA agrees with U S West that collaboration (of the sort described above) is to be undertaken directly, rather than through the BOC's separate affiliate. However, activities undertaken by a BOC pursuant to Section 273(b)(1) must be conducted in a manner otherwise consistent with the structural separation requirements, non-discrimination provisions, and other safeguards established in Sections 272 and 273 of the Act. To the extent a BOC provides information to its separate affiliate in the course of activities undertaken pursuant to Section 273(b)(1), for example, the non-discrimination requirements of Section 272(c)(1) and 273(c) would apply.

Respectfully submitted,

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